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Combined Metals v. State Tax Commission : Reply Brief

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

INDEX

CASES CITED

STATUTES:

MISCELLANEOUS:

In the Supreme Court
of the
State of Utah

Case No.

COMBINED METALS REDUCTION COMPANY 6869
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Plaintiffs & Respondents

vs.

STATE TAX COMMISSION and J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL and HEBER BENNION, JR., constituting said Tax Commission

Defendants and Appellants.

ANSWER TO PETITION FOR REHEARING

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STATEMENT

Although the brief heretofore filed in the Net Proceeds Tax cases (United States Smelting Refining and Mining Company vs. Phares Haynes, No. 6931 and Combined Metals Reduction Company vs. Tooele County, No. 6907) was designed to answer the arguments advanced by counsel in support of their petition for rehearing in the instant cases, in order to make the record complete and assist the court in analyzing the matters advanced by Respondents herein the following Brief is submitted. Since the general problem has been presented heretofore, we shall confine our remarks specifically to answering the several arguments, upon which Respondents rely as requiring a rehearing in the instant matters. Those arguments are presented to the Court in the Petition for Rehearing under seven separate points, which we proceed to discuss in the order presented by Respondents.

ARGUMENT

I

The first alleged error consists of the Court's failure "to distinguish between premium payments made on custom ores which had been sold and premium payments made on ores produced but not sold." The fallacy of this argument is twofold: First, it presupposes that premium payments were made on ores which were never sold—which is not the fact. It is true, as set forth in the Record, that premium payments in some instances were made *before* sale and some times *after* sale, as a

matter of time. But in all cases there was a sale of the ores in question. The stipulation reads as follows:

> "19. In certain instances premium payments are made in advance of a sale of ores or the metals recovered from ores; in other instances such payments are made after sale of the ores." (R. p. 54).

The affidavit executed by each mining company as a basis for payment of the premiums provides that the ore specified was "produced and delivered for sale" during the month in question. While Metals Reserve Company was willing, based on the producer's affidavit, to pay the premium in advance of the sale, it was not willing to pay for ore which never reached the processing or reduction plant in the cycle which finally resulted in a finished product for consumption.

Second, Counsel criticize the court for not distinguishing between custom ores and other ores, when there is nothing in the record which justifies or permits a distinction to be made between these two methods of ore production. All that is contained in the record is that with respect to Kennecott Copper Corporation and the United States Smelting Refining and Mining Company, premium payments are made "on the basis of the determined metal content of the precipitates and concentrates delivered to American Smelting and Refining Company" and "on the basis of monthly affidavits showing the production according to the Company's records" approximately 30 to 90 days before the ores are sold; while with independent or custom shippers, premium

payments are made at the end of the month in which the ores are produced and sold to the smelter or reduction works. (R. p. 54, 55). Since the only difference or distinction as shown by the record is in the time of payment of the premium (either prior or subsequent to the actual sale), we do not see how the court would have been justified in analyzing the two methods separately. And certainly there is no distinction between the *basis* for payment of the premiums on custom ores and ores produced and partially refined before sale.

At no time heretofore have counsel for Respondents attempted to differentiate between the two methods of production. They have at all times maintained that all of the mining companies fall in the same category—the joint trial, stipulation of facts, record on appeal, and the briefs filed in connection therewith reflect that position. Certainly, now is not the time to say that the Court erred because it did not do what no one has argued should be done—prior to the Petition for Rehearing.

On page 7 of their brief, Respondents argue that "premium payments were made upon the basis of affidavits showing the production and delivery to a smelter and not upon a sale, even in the case of custom ores." The same argument might be made with respect to many business transactions today, where payment for goods is made upon the basis of bills of lading, invoices, warehouse receipts or other evidences that certain goods have been produced and appropriated to the use of the Buyer. Here the ores must have been produced and delivered to

the smelter or reduction works "for sale" as set forth in the affidavit. In other words, delivered to the channels where the War Allocations Board then had exclusive power to control the metal and determine its further process either into shells, tanks, ships, guns, or other materials essential to the war effort.

Again counsel urge that because premium payments are based on the material paid for where settlement contracts exist, while fixed percentages are used where no settlement contract exists (Brief page 6) the court was in error in holding that "metals are not paid for under settlement contracts unless such metals are sold." The court's remark quoted was limited to transactions where settlement contracts did exist and merely illustrated that in all such instances the ore had actually been sold and the contract under which it was sold was used by the government in determining the metal content of the ore on which it paid the premium. However, the settlement contract itself may not have accurately reflected the exact metal content of the ore sold any more than the fixed percentages of 95, 90, and 85 percent of the metal content in the case of copper, lead and zinc respectively, used by the government where no settlement contract existed. The indicated percentages merely took the place of the percentages which were used in the settlement contracts—and which might have differed for each producer, depending upon its ability to command a favorable settlement contract with the smelter or reduction works.

In all cases the premiums were paid for *metals* contained in the ore. That was what the government needed to expedite the War effort. And in order to get more metal each producer was guaranteed 17 cents per pound for its copper, nine and one-fourth cents per pound for its lead, and eleven cents per pound for its zinc over and above the quota established for each metal as to each producer. This plan has been accurately described as being a "differential pricing technique." (See the Senate Sub-Committee Preliminary Report as found in the Appendix to the brief of Amici Curiae filed herein). That designation alone is sufficient to justify this Court in holding the premium payments to be a part of the price received by the mining companies for their ore production.

However, the Federal Government further recognized the "Premium Price Plan" as an integral part of its "pricing structure" when it adopted "Supplementary Regulation No. 4 to General Maximum Price Regulation—Exceptions." As therein contained "deliveries of metallic copper, lead, or zinc, or of ores or concentrates containing copper, lead or zinc * * * pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration" were exempted from the General Maximum Price Regulation. In other words, the Federal government recognized the right of each producer to receive more than the ceiling price for its ores under the premium price plan. Appellants seek only to require each producer to pay an occupation tax based

on the "gross amount" it received — from whatever source—from its ores.

II

As their second ground for seeking a rehearing, Respondents refer to parts of the stipulated facts where the word "production" is used in connection with the payment of premiums. For instance, it was stipulated that the Tax Commission included the amounts received by producers "as premiums on account of the *production* of ores by said mining companies in excess of quotas established." The word "production" has been defined by Webster to mean "That which is produced; a product." Let us insert that definition in lieu of the word "production" in the several illustrations given by Respondents:

> "(a) That the Tax Commission:
>
> 'has included as part of the gross amount received for or the gross value of metalliferous ores sold during the year 1943, the amounts received by said mining companies respectively from Metals Reserve Company as premiums on account of *that which is produced, the product* of ores by said mining companies in excess of quotas established * * *.' " (R. P. 28).
>
> "(b) . . . . 'premium payments shall be made for all *that which is produced, the product,* over quota in February and subsequent months.' " (R. p. 37-38).
>
> "(c) . . . . 'After quotas are established, premium payments are made solely upon the basis of *that which is produced, the product,* in excess of allotted quotas.' " (R. p. 40).

> "(d) . . . . 'Metals Reserve Company . . . . has agreed . . . . to pay to the producers of said metals . . . . the difference between the market price of the respective metals and the equivalent of seventeen cents (17c) per pound Connecticut Valley basis for copper, nine and one-fourth cents (9¼c) per pound New York basis for lead, and eleven cents (11c) per pound East St. Louis basis for zinc, as a premium for all *that which is produced, the product,* of such metals in excess of production quotas to be established. . . .' " (R. p. 47).

Indeed, no other construction of "production" could be used and accord with the over-all scheme used by the government to obtain additional strategic metals with which to prosecute the war. The very language quoted by Respondents earlier in their brief from the case of Vitagraph Inc. v. American Theatre Co., 77 Utah 71, 291 P. 303, indicates the danger of picking out a portion of the stipulation as was done above in an attempt to give a different meaning to the "premium payment" program than is permissible in the light of all the announcements and transactions surrounding the program. This court there held:

> "In construing a contract the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties even though the immediate object of inquiry is the meaning of an isolated clause."

Since Respondents refer to the concurring opinion

of Mr. Justice Wolfe, we also wish to quote from that opinion as follows:

> "While in concept I think the whole can be conceived of in law as the price the sale yields, in final analysis I do not believe it makes much difference whether the part which the smelters pay is called a ceiling price and the other a premium price or a subsidy. *After all we should look through terms to realities.* As holds the main opinion in reality the 'Amount of money . . . . actually received by the owner . . . . from the sale of all ores or metals during the calender year . . . .' was what those sales yielded and what they yielded was what was received from the mills or smelters or others to whom they were delivered plus what the Metals Reserve Company paid."

In Promulgating the program of premium payments the Government was not interested in "effort" or "activity" except as it might result in more ore. Nor was the Government interested in ore which remained on the dump or at the mine. The metal was needed in war materials. And the only way to get more metal was to pay more for it. As a result of being offered a tempting price for additional ore the mining companies produced more ore and made it available for the War effort. The fact that "differential pricing technique" was used at a great saving to the Government and thus to the taxpayer whose responsibility it is ultimately to pay the bill, does not alter the fact that the "quid pro quo" for the payment of the premiums was the actual metals—not mine development, exporation, or other mining endeavors. True, the payment of premiums to the pro-

ducers enabled them to engage in greater activity to increase their output, just as a high market price has always been an incentive for a manufacturer or producer to increase his output. Too, the amount paid by Metals Reserve Company was added to the amount otherwise paid for the ore so that seventeen cents per pound was received for the copper, nine and one-fourth cents per pound for lead and eleven cents per pound for zinc on such ores in excess of the quota established—which in most instances was zero.

We note that on page 10 of Respondents' brief, it is asserted that "in order to hold that premium payments were *received on a sale,*" it was necessary for the Court to find that there had been a sale or that the ores were treated at a smelter or reduction works which received ores from independent sources. The phrase "received on a sale" is nowhere used in the Statute, nor does the Court use such terminology. What the court did hold—which is in accord with the Statute—was that "the 'premium prices' paid to the mining companies are *for metals sold by them.*" As stated by Mr. Justice Wolfe, "It must be kept in mind that the tax imposed in this case is not one *on the sale* of ore or metals but one on the *privilege of mining.*" The amount of the tax is determined by the gross amount received from the ores, and the occasion or event upon which the tax accrues is the sale or other application of sub-paragraphs (a), (b), or (c) of Section 80-5-66, U.C.A. 1943.

In conclusion it is argued that to construe premium

payments as a part of the proceeds received from the ores would exade the provisions of the Maximum Price Regulations, and would put the government in the position of engaging in blackmarketing, after having established maximum prices "with all the surrounding safeguards." Of course what we have heretofore said with respect to Supplementary Regulation No. 4 which permitted this very procedure, disposes of this argument.

III

In reaching its decision, this Court did not disregard the provisions of Sections 81-1-1, U.C.A. 1943, defining a "Contract to Sell." This section does not provide that the amount received must be paid by the immediate *Buyer* or that the "*price*" must be paid at the time of sale. Therefore, the fact that premium payments were made by Metals Reserve Company and did not coincide with the time that the ceiling price was paid by the smelter does not violate the provisions of the Statute.

Nor do we agree with the statement contained on page 14 of Respondents' brief to the effect that "it is obvious that the premium payments received during the calendar year 1943 were not in many instances received from ore produced in that year, and certainly not as a result of sales of ore." So far as the record reveals, and as far as Appellants are concerned, the premium payments reported by the several mining companies were received for and charged to the ores sold during the calendar year in question. When the several Respondents filed their statements, required by Section 80-5-67, U.

C. A. 1943, they failed to report the total amount received for their ores, but reported only the amount received from the smelter or other reduction or processing plant. The Commission thereafter requested that each company report the premium payments received in connection with the sale of the ores already reported. This was apparently done. As shown by the Record (pp. 63-64) the only difference between the amount of Occupation Tax reported and the amount assessed, is the inclusion of the metal premium payments. All of the figures were furnished by the producers so that they should be in no position now to claim that there is a variance from what has always been conceded to be the correct assessment in the event that this Court should determine that premium payments were properly a part of the "gross amount received for, or the gross value of, metalliferous ores sold."

Again, under Argument 3, Respondents endeavor to argue that because premiums were paid "to increase production" there could be no relationship between such payments and the sale or disposal of the ores. The terms, "sale," "price," "premium" and "production" are used indiscriminately in connection with the "differential pricing technique" used by the government to "avoid profiteering and unwarranted price rises." The underlying purpose behind the program was to secure more of those strategic metals so vital to the War program, without at the same time allowing the producer to profiteer at the expense of the government and the taxpayer.

What we have heretofore said adequately disposes of Respondents' argument No. 3.

IV

The statement contained under this heading is a mere conclusion and not supported by the facts as they appear from the Record. We feel no purpose would be served in discussing this matter further, except as it is answered by the other arguments contained herein.

V

As in the brief filed in support of the Petition for Rehearing in the Net Proceeds Tax cases, we find counsel attempting to influence the Court by the statement made by Mr. Henderson of Metals Reserve Company in which he approves the Memorandum *prepared by the mining companies and submitted to him for such approval.* But as the Record shows (P. 57) "Metals Reserve Company has made no study of the provisions of the Utah laws relating to taxation of mines, and is not in a position to express any opinion concerning statements in the Memorandum on that subject." Nor is the commission "bound by the facts, inference or conclusions therein stated." (R. p. 56). As we have heretofore pointed out, the Circuit Court of Appeals, in the case of Kennecott Copper Corporation vs. Salt Lake County (not yet reported) determined that the question involved "is essentially one of local law and therefore these decisions (United States Smelting, Refining and Mining Co. v. Haynes, 176 Pac. (2d) 622, and Combined Metals

Reduction Co. v. State Tax Commission, 176 P. (2d) 614) of the supreme court of the state are controlling."

VI

The Court did not fail to follow the rules of statutory construction in reaching its decision in the instant cases. We recognize, as did the Court and Mr. Justice Wolfe, that there is "a good case" to be made for Respondents' position. As yet Respondents have failed to acknowledge that "a good case" can be made for Appellants' position,—even though this Court has determined that the Commission was correct in making the assessment complained of. We recognize and approve the authorities cited by Respondents under their Argument No. 6, particularly the language of this Court in the case of Norville v. State Tax Commission, 98 Utah 170, 97 P. (2d) 937, 126 A.L.R. 1318, as follows:

> "The duty of this court in construing and interpreting legislative acts is to give effect to the intent of the legislature." (citing cases).

And again:

> "Moreover, in seeking to give effect to the intent of the legislature the court will adopt that interpretation of a taxing statute which lays the tax burden uniformly on all standing in the same degree wtih relation to the tax adopted. In re Steehler's Estate, 195 Cal. 386, 233 P. 972. *And will avoid an interpretation which would lead to an impractical, unfair, or unreasonable result.* In re Parrott's Estate, supra." (Italics added.)

In the light of such persuasive language we

are compelled to state that in reaching its decision in the instant matters the Court followed the patern set forth above.

VII

For the first time Respondents seek to differentiate between premiums received under "A" quotas and those received under "B" and "C" quotas. At the risk of being criticized by opposing counsel, we feel we should advise the Court that in preparing the Stipulation of Facts with counsel for one of the mining companies having "B" and "C" quotas, one of counsel for Appellants asked if the company desired to include in the stipulation any facts which would call the court's attention to such additional quotas on the theory that such mining company would desire to make a further argument as to such quotas. However, counsel for the mining company stated that in his opinion there was not sufficient difference to justify calling the court's attention to the matter, and therefore the Stipulation was prepared and adopted on the theory that all premiums fell into the same category.

And as a matter of fact, Metals Reserve Company failed to make any distinction between the method of payment, or basis for payment in the case of the additional premiums. They were paid on the basis of a *fixed amount per pound* for the metal. It only resulted in a greater pricing differential with respect to the metals involved. Instead of receiving a total of 11 cents per pound for zinc, the producer, having a "B" or "C"

quota received an additional sum *per pound* for such metal.

If the court will refer to the affidavit of the producer shown at p. 53 of the Record, as requested by Counsel for Respondents, it will observe that the company therein indicated "produced and delivered for sale during the month" mentioned to International Smelting & Refining Co., a total of 510,305 pounds of copper *on every pound of which* it received a total of 27 cents (including ceiling price and premiums), a total of 162,863 pounds of lead *on every pound of which* it received a total of 12 cents (including ceiling price and premiums), and a total of 79, 975 pounds of zinc *on every pound of which* it received a total of 16½ cents (including ceiling price and premiums).

CONCLUSION

We respectfully submit that the Court's decision is sound and accords fully with the stipulated facts and the record and that there is no reason for granting a Rehearing for the purpose of re-arguing the same points heretofore raised by the parties, considered by the Court, and determined by its opinion rendered herein.

Respectfully submitted,

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